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11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA
13 WESTERN DIVISION
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11	UNITED STATES OF AMERICA,)	CASE NO. 10-CR-00299-MMM
12	Plaintiff,)	
13	v.)	DEFENDANT HAYRAPET AVETISYAN'S
14	SAAK AVAKYANTS, et. al.)	MOTION TO DISMISS THE INDICTMENT
15	Defendants.)	
16	_____)	DATE: August 30, 2010
17)	TIME: 1:15 PM

18 PLEASE TAKE NOTICE that Defendant, HAYRAPET AVETISYAN, by and
19 through his counsel Mark Windsor, hereby moves this Court for an order dismissing the
20 indictment in this case. This motion is based on the arguments below and upon such
21 other items that may be presented to this Court before the hearing and at the hearing on
22 this matter.
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1 **I. INTRODUCTION**

2 The government has charged Mr. Avetisyan with several counts, including
3 conspiracy to illegally transport hazardous materials, in violation of 18 U.S.C. § 371, and
4 illegal transportation of hazardous materials, in violation of 49 U.S.C. § 5124.
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6 The government alleges the following facts related to these charges: The lead co-
7 defendant in this case, Saak Avakyan, installed modified gas tanks on small passenger
8 and utility vans. Mr. Avakyan directed other co-defendants, including Mr. Avetisyan,
9 to drive these vans to gas stations to purchase gasoline with counterfeit credit cards and
10 fill the modified tanks. The co-defendants then were directed to drive to other gas
11 stations where the co-defendants unloaded the gasoline and Mr. Avakyan sold it for a
12 reduced price.
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15 Overt Acts 15, 18, and 19 of Count One of the indictment allege that Mr.
16 Avetisyan drove a van on December 8, 2009 to gas stations in North Hollywood,
17 California and filled the modified tank. Mr. Avetisyan then allegedly drove from a
18 station in Sherman Oaks, California to a station in Burbank, California to unload the
19 gasoline in the modified tank. Count Nineteen of the indictment also alleges that Mr.
20 Avetisyan and Mr. Avakyan illegally transported the gasoline on December 8, 2009
21 from the gas station in Sherman Oaks, California to the gas station in Burbank,
22 California. Mr. Avetisyan requests that the Court partially dismiss Count One of the
23 indictment and dismiss Count Nineteen of the indictment where the indictment fails to
24 allege that Mr. Avetisyan violated section 5124 of the Hazardous Materials
25 Transportation Act ("HMTA"), and because the statute does not apply to the conduct that
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1 has been alleged.

2 **II. ANALYSIS**

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4 A defendant may raise a motion alleging that the indictment fails to state an
5 offense at any time while the case is pending. Fed. R. Crim. P. 12(b)(3)(B). The
6 indictment must be a written statement of the essential facts constituting the offense
7 charged. Fed. R. Crim. P. 7(c)(1). While mere error in a citation or a citation's omission
8 in the indictment is not sufficient grounds for dismissal, Fed. R. Crim. P. 7(c)(3), an
9 indictment that is completely missing an essential element of the crime generally contains
10 a fatal mistake. *United States v. Du Bo*, 186 F.3d 1177, 1180 (9th Cir. 1999). The
11 essential purpose of the indictment is to put the defendant on notice of the charges against
12 him so that he can adequately defend or plead his case. *United States v. Fleming*, 215
13 F.3d 930, 935 (9th Cir. 2000); *United States v. Sutcliffe*, 505 F.3d 944, 961 (9th Cir.
14 2007). Where an indictment fails to sufficiently apprise the defendant of what he must be
15 prepared to meet, the court may dismiss that indictment. *United States v. Fuentes*, 252
16 F.3d 1030, 1032 (9th Cir. 2001). The defect may not be cured by amendment or through
17 jury instructions. *United States v. Keith*, 605 F.2d 462, 464 (9th Cir. 1979). The
18 prosecutor and the court may not make a subsequent guess as to what was in the minds of
19 the grand jury at the time that they returned the indictment without jeopardizing a
20 defendant's right to indictment by grand jury under the Fifth Amendment. U.S. Const.,
21 Amend V; *Keith*, 605 F.2d at 464.

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A. THE INDICTMENT ALLEGES THAT MR. AVETISYAN VIOLATED HTMA REGULATIONS BY TRANSPORTING GASOLINE IN A MOTOR VEHICLE, MORE SPECIFICALLY A PASSENGER VAN.

Count One of the indictment in this case alleges in part that the Mr. Avetisyan and his co-defendants conspired “to willfully and recklessly violate regulations promulgated under the HMTA prohibiting the transportation of hazardous materials in a *motor vehicle* that was not placarded.” (Docket Entry No. 35, at 3). Defendant Saak Avakyants “modif[ied] motor vehicles, *namely vans*, so that such vans would contain a concealed gasoline storage tank.” (Docket Entry No. 35, at 3) (emphasis added). Furthermore, Count Nineteen alleges that Mr. Avetisyan and Mr. Avakyants transported gasoline “in a *van* that did not have placards identifying the material as ‘flammable’ or ‘flammable gas’.” (Docket Entry No. 35, at 12) (emphasis added). The indictment does not specifically allege how many gallons of gasoline total each defendant transported.

Section 5124 of the HMTA criminalizes a willful or reckless violation of a regulation under the Act. 49 U.S.C. § 5124. The government alleges that Mr. Avetisyan violated regulations 172.504 and 172.542 of the HMTA when transporting the gasoline from a gas station where the gas was pumped to a gas station where the gas was dumped.

Regulation 172.504 states:

[E]ach bulk packaging, freight container, unit load device, transport vehicle or rail car containing any quantity of a hazardous material must be placarded on each side and each end with the type of placards specified in Tables 1 and 2 of this section . . .

49 C.F.R. § 172.504(a). Table 2 of the section lists flammable materials as one of the

1 hazardous materials that requires placards when being transported. 49 C.F.R. §
2 172.504(e). The regulation cross-references Regulations 172. 532 and 172.542 which
3 provide images of the placards that must be displayed when transporting flammable
4 materials. 49 C.F.R. §§ 172.532, 172.542. Mr. Avetisyan allegedly violated Regulation
5 172.504 by failing to display placards on the passenger van that he used to transport the
6 gasoline.
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9 **B. COUNT ONE MAY BE PARTIALLY DISMISSED AND COUNT**
10 **NINETEEN MAY BE DISMISSED WHERE THE INDICTMENT**
11 **FAILS TO ALLEGE THAT MR. AVETISYAN TRANSPORTED**
12 **THE GASOLINE IN BULK PACKAGING OR A TRANSPORT**
13 **VEHICLE.**

14 The placard requirements of Regulation 172.504 do not apply to the type of
15 vehicle that Mr. Avetisyan used to transport the gasoline. A plain reading of the
16 regulation supports this conclusion. The regulation explicitly lists the types of vehicles
17 and containers that must have placards when transporting gasoline, including “bulk
18 packaging, freight container, unit load device, transport vehicle or rail car.” 49 C.F.R. §
19 172.504(a). This list does not include either a motor vehicle or a passenger van of the
20 type that the government alleges in its indictment. Had Congress or the Department of
21 Transportation intended for the HMTA to apply to modified gas tanks in passenger motor
22 vehicles, it would have stated so in Regulation 172.504. While it may be possible to
23 equate a “motor vehicle” with a “transport vehicle,” other hazardous materials regulations
24 under the same chapter make a distinction. *See, e.g.*, 49 C.F.R. § 172.322 (distinguishing
25 between the requirements for the display of marine pollutant placards on transport
26 vehicles and motor vehicles); 49 C.F.R. § 172.516 (distinguishing the requirements for
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1 the display of placards on transport vehicles and motor vehicles). Another regulation
2 under the same chapter provides examples of a “transport vehicle” to include a “semi-
3 trailer or freight container-on-chassis.” 49 C.F.R. § 176.606. The passenger van in this
4 case had a modified tank which could carry a limited amount of gas not on the scale of a
5 cargo-carrying semi-trailer truck. As a result, none of these terms encompass the
6 description of a motor vehicle or passenger van with a modified gas tank.
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9 Furthermore, the modified gas tank alleged in the indictment is not “bulk
10 packaging” under the regulation. The HMTA defines a “bulk packaging” as a receptacle,
11 other than a vessel or barge, including a transport vehicle or freight container, in which
12 hazardous materials are loaded with no intermediate form of containment and which has
13 a maximum capacity greater than 450 liters, or 119 gallons, as a receptacle for liquid. 49
14 C.F.R. § 171.8. However, nowhere in the indictment does the government allege that the
15 modified gas tank on the passenger van had a maximum capacity greater than 119
16 gallons. (Docket Entry No. 35). While the indictment does allege that Mr. Avetisyan
17 made two separate purchases for \$125.00 each on December 8, 2009, it does not allege
18 how many gallons of gasoline these two purchases amounted to. (Docket Entry No. 35,
19 at 6-7). Without specifically stating how large the van’s modified gas tank was, the
20 indictment fails to allege that the tank was a “bulk packaging” requiring placards under
21 Regulation 172.504.
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25 The Department of Transportation has already created regulations for the
26 installation of modified gas tanks in passenger vehicles. *See, e.g.*, 49 C.F.R. § 571.301
27 (specifying standards for the integrity of motor vehicle fuel systems). These regulations
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1 require structural barriers around gas tanks installed in motor vehicles to reduce the risk
2 of deaths and injuries occurring from fires that result from fuel spillage during and after
3 crashes. 49 C.F.R. § 571.301, S.2. This is exactly the type of risk that results from
4 installing a modified gas tank in a passenger vehicle and driving that vehicle on the road.
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6 These regulations were created as part of the Federal Motor Vehicle Safety Standards
7 under Chapter 301 of Title 49 and would not fall within the scope of section 5124 of the
8 HMTA. 49 U.S.C. § 5124 (criminalizing the violation of regulations issued under
9 Chapter 51 of Title 49). Since the Department of Transportation has already created
10 regulations to provide for the safe transportation of gasoline in modified gas tanks, it is
11 unlikely that the Department intended for the regulations of Hazardous Materials
12 Transportation Act to also apply.
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15 **III. CONCLUSION**

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17 Ultimately, the government's indictment does not allege facts that show a
18 violation of the HMTA's regulations giving rise to criminal conduct under 49 U.S.C. §
19 5142. Where the government fails to sufficiently allege a violation of regulations under
20 the HMTA, the Court may dismiss in part Count One and dismiss Count Nineteen.
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23 Respectfully submitted,

24 DATED: AUGUST 9, 2010

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26 _____/s/_____
27 MARK WINDSOR
28 Attorney for Hayrapet Avetisyan